After further investigation, the hospital held two meetings with Dufault (Pet. App. D pp. 38a-40a). Dufault was shown the records demonstrating the discrepancies (Pet. App. D pp. 38a-40a) in a meeting that lasted 30 to 40 minutes. At the arbitration hearing, the grievant asserted a lack of memory as a reason for not being able to respond to the accusations, and she offered her "best recollections" and "speculation" (Pet. App. D p. 39a).

The hospital was suspicious of drug diversion and decided to offer the grievant either a leave for a rehabilitation program or termination, if she could not provide some resolution of the discrepancies at a second meeting (Pet. App. D pp. 39a-40a). At the second meeting, the hospital, which had done further investigation based on the grievant's explanations at the first meeting, confronted Ms. Dufault with findings. In one instance where Ms. Dufault had been asked to explain her withdrawal of an additional 18 mg. of Ativan for a patient who had already been medicated, Ms. Dufault had asserted that she had delivered the medication by IV drip (Pet. App. D pp. 39a-40a). But the records showed the IV bag had been discontinued a day earlier (Pet. App. D pp. 39a-40a). She was also questioned about two other excessive withdrawals of morphine which had occurred (Pet. App. D pp. 39a-40a). With no explanation from Ms. Dufault, the hospital terminated her employment for:

> Failure to adhere to the standards of narcotic/ controlled substance administration - suspected drug diversion. (Pet. App. D p. 40a).

(Cont'd)
in the removal of drugs involved the removal of more drugs than had been prescribed by the physician.

In her opinion, the arbitrator found that the hospital did not prove by a preponderance of the evidence that the grievant "knowingly engaged in drug diversion" (Pet. App. D p. 44a). As a basis, the arbitrator cited the grievant's own inaccuracies and omissions in "keeping proper records with respect to controlled substances." (Pet. App. D pp. 44a-45a).

The inaccuracies and omissions were, of course, one of the transgressions that the grievant was accused of. But the arbitrator's opinion both exonerates the grievant for this and approves of the failure to keep adequate records and follow proper procedure in the dispensing of controlled substances. Although the issues involved the grievant withdrawing more drug than was prescribed for the patient, the arbitrator chose to characterize this as a documentation issue (Pet. App. D p. 50a). In doing so, the arbitrator then explained the grievant's failures in documentation as forgetting to record the proper amounts into the system at the end of a long day. The arbitrator excused the whole notion of proper documentation as required by law as too much to expect:

> "This also corroborate the Grievant's testimony that she may have mistated the times and/or amounts of dosages when she did her paperwork at the end of her shift; if she was operating mostly from memory by that time, it would be surprising if she *could* remember *exactly* what she did when over the course of a twelve hour shift." (Pet. App. D p. 50a)

Having disposed of the notion of any need to obey nursing regulations as to documentation, the arbitrator turned to the issues raised by the grievant's explanation of her behavior. The grievant had attempted to explain one of her

excess withdrawals by claiming she had delivered the medicine by IV, contrary to both doctors orders and proper nursing practice (Pet. App. D pp. 50a-52a).

The arbitrator mocked the concept of compliance with proper practice; with respect to both that instance, the excessive withdrawals and failure to document:

> The second witness called on rebuttal, Patricia Duclos-Miller, testified that it was not "*proper*" for nurses to record the administration of controlled substances in nurses' notes, and it was not "*proper*" to take out additional medications ahead of time or to use a discontinued i.v. drip where the physician's order was for an i.v. push, and that extra narcotics (i.e. those not administered) should be wasted in the presence of (and counter-signed by) another RN. This testimony, while credible, is non-dispositive. It in no way disproves that Grievant's testimony that she (and other RN's) occasionally deviated from proper procedures by using short-cuts or by helping each other out during breaks, and so forth. (Pet. App. D p. 50a-51a)

With respect to this same incident, which involved the removal by the grievant of 18 mg of Ativan at 2:25 a.m. for a patient who had already received their medication earlier, the grievant had claimed to have placed that medicine in a discontinued IV bag, because she claimed she had delivered the medication earlier by use of the IV. The physician had ordered administration by syringe (Pet. App. D pp. 51a-52a). A hospital witness, Kathy Hutchins, had testified that if this had happened it was, in addition to being contrary to doctor's

orders, a bad medical practice (Pet. App. D pp. 51a-52a). The arbitrator decided that the failure to follow doctor's orders and the improper method of administration didn't matter as long as it was "possible" and "not lethal":

> Although she disagreed with the methods the grievant said she used in administering an additional 18 mg of Ativan that she removed from the Omnicell, Hutchins did not testify that it was impossible or medically lethal to do what the Grievant thought she did." (Pet. App. D p. 52a)

The arbitrator then exonerated the grievant on grounds that these were only "technically improper shortcuts." (Pet. App.D p. 51a)

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Of Appeals Permits An Arbitrator To Override State And Federal Laws And Regulations Regarding Nursing Practice And The Use And Administration Of Controlled Substances And Should Be Vacated.

This case presents an important question under federal law that has not been, but should be, settled by this court: whether the federal courts under 29 USC §301 should affirm an arbitration award which effectively nullifies state regulations of nursing practice and state regulation of the use and administration of controlled substances, by preventing an employer from reasonable enforcement of the standards established by law. This court should hold that an arbitration award violates public policy when it negates the ability of a hospital to discipline an employee who violates the law with respect to the use and administration of

controlled substances and nursing practice, which the hospital has an obligation to monitor.

The Court of Appeals agreed that the grievant's conduct violated Massachusetts nursing regulations. *Mercy Hospital*, 429 F.3d at 345 (Pet. App. A p. 12a). The Court of Appeals, however, fails to overturn an arbitration award which prohibited the hospital from disciplining a registered nurse who the arbitrator found had, in several different ways violated established public policy as to nursing practice and the administration of controlled substances.

This court has recognized that an arbitration award can be vacated where it violates public policy, even if the reinstatement award might not itself violate positive law. *Eastern Associated Coal Corp.* v. *United Mine Workers of America*, 531 U.S. 57, 63 (2000). That standard should now be used to overturn an arbitration award such as here, where the ability of a hospital as employer to monitor proper use and administration of controlled substances is nullified by an arbitrator's absolution of violations of specific state nursing regulations.

A. The Arbitrator's Award Violated Well Established And Explicit Public Policies.

The arbitrator's award violates clear and explicit standards, not just general standards of safe nursing care. The use of controlled substances is highly regulated under state and federal law and indisputably represents an important public policy. See generally 21 U.S.C. §301 *et seq.*, 21 U.S.C. §801 *et seq.*, M.G.L. c. 94C §1-48, *cf. Gonzales* v. *Oregon*, ____ U.S. ____, 126 S.Ct. 904 (2006). State regulations also provide particular standards for the conduct of nurses:

Each nurse licensed by the Board and engaged in the practice of nursing shall have knowledge and understanding of the Standards of Conduct for Nurses set forth in 244 CMR 9.00, all state laws and Board regulations governing the practice of nursing, and all other state and federal laws and regulations related to the practice of nursing. . . . 4 . . .

Adherence to Standards of Nursing Practice. A nurse licensed by the Board shall engage in the practice of nursing in accordance with accepted standards of practice. . . .

(a) A nurse who holds a valid license shall comply with M.G.L. c. 11: §§74 through 81C, as well as with any other laws and regulations related to licensure and practice. Examples of such laws include, but are not limited to, the following: . . .

1. M.G.L. c. 94C (Controlled Substances Act - requirements for possession, dispensing, administering, and prescribing controlled substances); . . .

(10) Acts within Scope of Procedures. A nurse who holds a valid license and is engaged in the practice of nursing in Massachusetts shall perform acts within the scope of nursing practice as defined in M.G.L. c. 112, §80B and 244 CMR 3.00. . . .

(35) Security of Controlled Substances. A nurse licenses by the Board and engaged in the

> practice of nursing shall maintain the security of controlled substances that are under his or her responsibility and control. . . .
>
> (37) Unlawful Acquisition and Possession of Controlled Substances. A nurse licenses by the Board shall not lawfully obtain or possess controlled substances.
>
> (38) Administration of Drugs. A nurse licensed by the Board shall not administer any prescription drug or non-prescription drug to any person in the course of nursing practice except as directed by an authorized prescriber. . . .
>
> (39) Documentation of Controlled Substances. A nurse licensed by the Board shall document the handling, admission, and destruction of controlled substances in accordance with all federal and state laws and regulations and in a manner consistent with accepted standards of nursing practice.
>
> 244 C.M.R. §9.03

These explicit regulations are repudiated by the arbitrator's opinion, because Mercy is prohibited from disciplining a nurse for violation of these very standards. Nancy Dufault was terminated for "failure to adhere to the standards of narcotic/controlled substance administration - suspected drug diversion" (Pet.App. D p. 40a). The arbitrator finds that Ms. Dufault did indeed fail to adhere to the proper standards, and at a minimum does not dispute that such failure

gives grounds to suspect diversion, but excuses those failures by claiming the standards are unrealistic (Pet. App. D pp. 50a-52a). The arbitrator finds that the nurse in this case:

- misstated the time and amount of dosages of controlled substances she administered (Pet. App. D p. 50a). See 244 C.M.R. §9.03 (39)

- failed, completely on some occasions, to record her administration of controlled substances in the medical record (SMS/MAR) where it was to be properly recorded (Pet. App. D pp. 49a-51a). *See* 244 C.M.R. §9.03 (35) (39)

- withdrew "additional" medications prior to the time they were needed (Pet. App. D pp. 49a-51a). *See* 244 C.M.R. §9.03 (35) (39)

- used a "drip" discontinued by the physician to deliver a controlled substance to a patient, i.e., in the opposite of the manner prescribed by the physician.[2] (Pet. App. D pp. 51a-52a). *See* 244 C.M.R. §9.03 (38)

- further ignores the fact the nurse failed on several occasions to document and have witnessed (by signature) the waste of narcotics or controlled substances where more was

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2. This is no mere technicality. Even the arbitrator notes it was not "good practice" because of the difficulty of controlling the speed of injection into the body. The arbitrator makes it seem as if this was just a disagreement about methodology or an accepted shortcut. Failure to give the medication in the manner prescribed by the physician is specifically prohibited by 244 C.M.R. §9.03 (38).

withdrawn than was necessary.[3] (Pet. App. D pp. 49a-52a).

Each of these actions is specifically prohibited by the regulations. Maintenance of the security of controlled substances requires proper documentation and adherence to procedures for waste (244 C.M.R. §9.03 (35) (39)). Drugs are to be administered only as directed by an authorized prescriber (244 C.M.R. §9.03 (38)), not by "shortcuts".

Nowhere in the statutes or regulations is such conduct excusable on grounds that no one was killed. The Hospital has an obligation to follow the law and to maintain proper procedure for the use of controlled substances. The arbitrator says Mercy cannot enforce that standard. The arbitrator argues that Mercy did not *prove* drug diversion. But that is not what the grievant was charged with, and the regulations exist to prevent the easy concealment of diversion by the practitioner.

These are not generalized concerns about the public interest or even just patient safety, although those issues certainly are implicated. This case involves an arbitrator mockingly dismissing specific regulatory standards for the use of controlled substances by registered nurses, and forcing the hospital to lower its standards below that required by state law.

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3. This too is no technicality. It is specifically prohibited by 244 C.M.R. §9.03 (39). Often times medication comes in sizes larger than the prescribed dose. Consequently, nurses are required to give the required dose only and with a witness present and signing off, waste the remainder *and* record the waste in the Omnicell. Without adherence to these required procedures any nurses could continually take additional narcotics, and "claim" it was waste, and there would be no way to dispute it.

B. The Lower Court Decisions Condoned Violations Of Specific Public Policies And Would Frustrate An Employer's Attempt To Comply With The Law.

While arbitration awards are entitled to deference despite errors of fact or law, they are not free from challenge if they violate public policy. A court may not enforce a collective bargaining agreement that is contrary to public policy. *W.R. Grace and Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983). In *United Papermakers Int'l Union AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 43 (1987) this court held:

> A court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

Id., at 43

The Court addressed this topic most recently in *Eastern Associated Coal Corp.* v. *United Mine Workers of America*, 531 U.S. 57 (2000). There the court reiterated its *Misco* holding and stated:

> We must then decide whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable "a collective-bargaining agreement that is contrary to public policy." *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76

> L.Ed.2d 298 (1983). The Court has made clear that any such public policy must be "explicit," "well defined," and "dominant." *Ibid.* It must be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Ibid.* (quoting *Muschany* v. *United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945)); accord, *Misco, supra*, at 43, 108 S.Ct. 364. And, of course, the question to be answered is not whether Smith's drug use itself violates public policy, but whether the agreement to reinstate him does so. To put the question more specifically, does a contractual agreement to reinstate Smith with specified conditions, see App. to Pet. For Cert. 29a, run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests? *See Misco, supra*, at 43, 108 S.Ct. 364.

Consequently, an employer challenging an arbitration decision on the basis of the public policy exception must establish two things: (1) a clear, well defined and dominant public policy; and (2) that the arbitrator's decision is contrary to that public policy.

Recently, the Massachusetts Supreme Judicial Court addressed these issues in *City of Boston* v. *Boston Patrolmen's Association*, 443 Mass. 813 (2005). In that case a police officer who was found to have made a false arrest, brought false charges and then lied about the conduct in sworn testimony, had his termination reduced to a one year suspension by the arbitrator. *Id.* at 813-820. In reversing the

decision, the court held: "we do not order a party to engage in an action that offends strong public policy." *Id.* at 818. Citing the *Eastern Associated Coal Corp.* decision, the court further held:

> That DiSciullo has not been convicted of any felony and that the arbitrator did not credit the assault and battery charges against him are, contrary to the association's assertion, beside the point. There is no question that DiSciullo lied under oath in the criminal complaints against Rodriguez and Caminero and at the arbitration hearing, if not elsewhere. It is the felonious misconduct, not a conviction of it, that is determinative. For an arbitration award to violate public policy, it need not violate the letter of a statute. See *Eastern Associated Coal Corp.* v. *United Mine Workers, Dist. 17, supra* at 63, 121 S.Ct.462 *821 "the court's authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law").

Id. at 820-821

This interpretation of *Eastern* - that the public policy doctrine should be invoked so that the *employer* is not made to engage in action (reinstatement of a law breaker) which offends public policy - is consistent with this court's jurisprudence and should be adopted here.

In the present case the arbitrator forces the hospital to return to work a registered nurse who she finds has violated numerous specific regulations regarding the use and documentation of controlled substances. The Court of Appeals agreed that the nurse had violated the law. *Mercy Hospital*, 429 F.3d at 345 (Pet. App. A p. 12a).

Several federal courts have vacated arbitration decisions on similar public policy grounds. *See, e.g., Russell Mem'l Hosp. Assoc. v. U.S. Steelworkers of Am.*, 720 F.Supp. 583 (E.D. Mich. 1998) (vacating an arbitration award reinstating a nurse who failed to properly administer medication to a patient on grounds that the award violated the state's public policy of ensuring safe and competent nursing) ; *EXXON Corp. v. Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997) (vacating arbitration award reinstating truck driver who tested positive for cocaine on grounds that it violated public policy against employees performing safety-sensitive jobs while under the influence); *Delta Air Lines, Inc. v. Air Line Pilots Assoc.*, 861 F.2d 665 (11th Cir. 1989) (vacating an arbitration award reinstating an airline pilot who flew a plane while intoxicated on public policy grounds); *Iowa Elec. Light & Power Co. v. Local Union 204 of IBEW*, 834 F.2d 1424 (8th Cir. 1987) (vacating on public policy grounds, an arbitration award that reinstated a nuclear power plant employee who deliberately breached safety protocol); *U.S. Postal Service v. Am. Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984) (upholding vacation of arbitration award reinstating postal employee convicted of embezzling postal funds); *Amalgamated Meat Cutters v. Great W. Food Co.*, 712 F.2d 122 (5th Cir. 1983) (vacating on public policy grounds an arbitrator's award reinstating a truck driver charged with operating a truck while intoxicated). At least one state court has vacated an arbitrator's reinstatement of a nurse on the grounds that it violated a "well-defined and dominant public policy in favor of safe nursing care." *Ill. Nurses Assoc. v. Bd. of Trs. of the Univ. of Ill.*, 741 N.E. 2d 1014, 1023 (Ill. App. Ct. 2001).

Overturning the arbitration award in this case is consistent with *Eastern Associated Coal Corp.* v. *United Mine Workers of America*, 531 U.S. 57 (2000). The *Eastern* court specifically approved vacation of an award in some circumstances where the award itself does not violate positive law:

> We agree in principal that the court's authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. *Id.* at 63.

The adoption of this principle is clearly intentional as the concurring opinion of two justices takes issue with this very point. *Id.* at 67-68. It does require explicit public policy to be at issue:

> "The Court has made clear that any such public policy must be "explicit", "well defined", and "dominant". *Ibid.* It must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

Id. at 62.

The court requires a *reference* to positive law, not an absolute violation of it per se. The requirement that the reference be to an explicit, well-defined and dominant public policy is a requirement which the plaintiff in this case has manifestly demonstrated above.

Eastern's result turned on the court's determination that the statute in question specifically did not require dismissal

of the employee and that the arbitrator's approach: suspension with conditions, was actually *in concert* with the statutory scheme which had specifically rejected dismissal and encouraged rehabilitation. *Id.* at 64-66. Here, the arbitrator's decision is not in concert with a statutory scheme, instead the arbitrator *mocks* the regulatory requirements, and forces the employer to ignore them.

In *Eastern* the employee won an arbitration award in which the arbitrator did not condone the employees behavior. Instead, the arbitrator fashioned a remedy that the court determined was consistent with the public policy at issue because those policies favored rehabilitation, specifically rejecting a requirement of dismissal and instead leaving decisions on reinstatement "to management/driver negotiations." *Eastern* at 64-65. As the court stated:

> The award before us is not contrary to these several policies taken together. The *award does not condone Smith's conduct* or ignore the risk to public safety that drug use by truck drivers may pose. Rather, the award punishes Smith...
>
> *Eastern,* at 65 (emphasis supplied)

Here the arbitration award does just the opposite: it does explicitly condone specific violations of public policy and prohibits any penalty against the offender. The Court of Appeals made no attempt to recognize or deal with this distinction.

The Court of Appeals mis-stated the actual issued by treating the case as an issue of intentional drug diversion vs. negligent action by the nurse. While it may be that the arbitrator did not make a finding of intentional *drug diversion*, that was not specifically what the grievant had been fired for. The reason for dismissal was "failure to adhere to the standards of narcotic/controlled substance administration - suspected drug diversion" (Pet. App. D p. 40a).

The arbitrator still did find that the grievant had violated specific requirements for the handling controlled substances (Pet. App. D p. 40a). The hospital did not argue, as the Court of Appeals states, that these actions were not deliberate. See *Mercy Hospital*, 429 F.2d at 344 (Pet. App. A p. 11a). Indeed, they were deliberate and the arbitrator's opinion compels that conclusion. The grievant's actions - such as deciding to deliver a drug in an improper manner contrary to the physician's orders, and withdrawing more medication than was prescribed - are not acts of negligence, but intentional acts. Their significance lies in the fact that they permit concealment of diversion. There was, therefore, no grounds to treat the matter as being comparable to other cases involving the negligence of a nurse.

To complicate the matter, the Court of Appeals then makes several assertions of "findings" by the arbitrator which are not supported by the record. The Court states:

> In endeavoring to make the showing that *Boston Medical Center* requires, an employer cannot relitigate the facts as found by the arbitrator. *See Misco*, 484 U.S. at 44-45. In this case, based largely on the testimony of the Hospital's own witnesses, the arbitrator found that Dufault was a

> competent, hard-working nurse who had exceeded her employer's standards for many years; that neither Dufault's documentation bevues nor the single instance of her improper administration of Ativan had caused any harm to patients; that her explanation for the discrepancies in the records was credible; and that, in all events, there was no evidence of missing medication, let along drug diversion. The arbitrator did not find that Dufault posed a risk of harm to patients, that she was incapable of properly documenting the administration of medication, or that she had displayed a pattern of failing to comply with doctors' orders. *Mercy Hospital*, 429 F.3d at 345 (Pet. App. A pp. 13a-14a).

The arbitrator nowhere states that "there was no evidence of missing medications." Indeed, the arbitrator *ignores* the issue of missing medication despite noting excessive withdrawals. To also say that the arbitrator did not find that the grievant was "incapable of proper documentation" (*Mercy Hospital*, 429 F.3d at 345) misses the issue by a mile: the problem was that the grievant was simply deciding not to document and such a failure would permit the concealment of improper and excessive withdrawal of the drugs.

Nor did the arbitrator find that the grievant had not displayed a pattern of failing to comply with doctor's orders. *Id.* at 345. Instead, the arbitrator assumed that these things had occurred, and mocked the idea that they should be a matter of concern.

By determining the case on the basis of whether it is either intentional or negligent misconduct and further deciding that the decision of whether to overturn a decision

should rest on the *degree* of harm caused by the employee's blameworthiness, the Court of Appeals ignored and avoids the appropriate issue: that by prohibiting the sanction of a violation of the regulations, the arbitration decision leaves the Hospital with no ability in the future to enforce compliance with proper practice and regulation of controlled substances. What the Court of Appeals chooses to characterize as negligence is the violation of regulations designed to prevent a claim of negligence or forgetfulness from being used to conceal the misuse of controlled substances. The arbitrator concedes the unrebutted testimony as to proper practice and documentation. Those practices, such as contemporaneous recording of the administration of a drug in an official record, adhering to the amount and method prescribed by the doctor, having the disposal of excessive medication witnessed - all serve to prevent concealment of the abuse of controlled substances by someone claiming they "forgot" or "didn't think it was important." By treating the case as an issue of negligence, the Court of Appeals, like the arbitrator, dispenses with compliance with the law as an unnecessary fussiness.

CONCLUSION

For these reasons, this Court should grant certiorari and adopt a standard that, even where the arbitration award does not itself violate positive law, it should be vacated where it frustrates and/or prohibits the employer from enforcing compliance with the law via personnel action.

Where an employer is placed in the position of responsibility for compliance with the law (here of controlled substances), an arbitration award cannot be allowed to frustrate the employer's effort to see to it that its employers comply with the law.

Respectfully submitted,

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Dated: February 21, 2006

APPENDIX

APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 21, 2005

NO. 05-1525

THE MERCY HOSPITAL, INC.,

Plaintiff-Appellant,

v.

MASSACHUSETTS NURSES ASSOCIATION,

Defendant-Appellee.

JUDGMENT AND OPINION

Entered: November 21, 2005

This cause came on to be heard on appeal from the United States District Court for the District of Massachussetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court
Richard Cushing Donovan, Clerk

By: Margaret Carter, Chief Deputy Clerk

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Hon. Michael A. Ponsor, U.S. District Judge
Hon. Kenneth P. Neiman, U.S. Magistrate Judge

Before

Boudin, Chief Judge,

Selya, Circuit Judge,

and Stahl, Senior Circuit Judge.

SELYA, Circuit Judge. In this case, the district court confirmed an arbitration award that directed a hospital to reinstate an intensive-care nurse. The hospital, citing the pains that must be taken by health-care professionals to restrict the distribution of controlled substances, appeals on the ground that the reinstatement order transgresses public policy. After studying the matter, we agree with the district court that the arbitral award should be confirmed.

I. BACKGROUND

We start by rehearsing the underlying facts. We then limn what transpired before the arbitrator and the district court, respectively.

Plaintiff—appellant Mercy Hospital (the Hospital) operates an acute care hospital facility in Springfield, Massachusetts. Defendant-appellee Massachusetts Nurses

Appendix A

Association (the MNA) is the authorized collective bargaining representative of • the nurses who toil there. The Hospital and the MNA are (and were at all relevant times) parties to a collective bargaining agreement (CBA). The CBA recognizes the Hospital's right to "discipline or discharge employees for just cause" and establishes a multi-step grievance procedure, culminating in binding arbitration, for the resolution of employment-related disputes between the Hospital and the nurses.

The Hospital hired Nancy Dufault as a nurse in 1977. In the pertinent time frame (2001-2002), Dufault worked the twelve-hour night shift in the intensive care unit (ICU). Part of her responsibilities included administration of Ativan, morphine, and other controlled substances designed to relieve pain or anxiety. Dufault also served as a preceptor charged with ground-level oversight of fledgling ICU nurses (orientees).

Over her estimable quarter-century career, Dufault developed a reputation as an industrious, highly skilled nurse. In 1995, the Hospital gave her a special commendation for her service as a preceptor. Her last performance evaluation, prepared shortly before the events in question occurred, describes her as "a very strong expert critical care nurse" and remarks that she had exceeded hospital standards in a number of performance areas.

In the fall of 2001, storm clouds gathered. The Hospital revised its system for administering medication to ICU patients and installed an Omnicell machine in that unit. The machine functions as a computerized medicine cabinet. To

obtain medication, a nurse must enter into an electronic keypad her personal code, the patient's personal code, the type of drug, and the dosage. The Omnicell processes this information and automatically unlocks the compartment housing the requested medication.

After administering the medicine to the patient, the nurse records the time, the identity of the drug, and the dosage in a separate database known as SMS. Each night, a patient-specific medicine administration schedule (MAS) displaying the data entered into the SMS system is printed out and filed in the patient's chart. The purpose of this double-entry regime is to enhance the Hospital's ability to track and correlate requests for and administration of medications in the ICU.

In June of 2002 a nursing supervisor approached Dufault about a possible discrepancy in the dual entries for a patient in her care. The supervisor accepted Dufault's on-the-spot explanation and allowed the indident to pass without further inquiry.

The following month, the same supervisor detected what appeared to be inconsistencies between the Omnicell record and the MAS of one of Dufault's patients. The supervisor conducted an independent review of Dufault's entries into the Omnicell and SMS systems. Based on that review, the supervisor and a nurse who had assisted her concluded that, on a number of occasions, Dufault had withdrawn medication from the Omnicell without recording an offsetting entry for administration in the SMS system. They related their conclusions to the director of nursing, Mary Brown, who placed Dufault on administrative leave pending further investigation.

Appendix A

On August 27, 2002, Brown met with Dufault, an MNA representative, and the two nurses who had conducted the initial review. Brown presented Dufault with the Omnicell and SMS printouts for five different patients and asked her to explain the inconsistences in her entries. With respect to an instance in which she had withdrawn eighteen milligrams of Ativan but had made no record of dispensing such a dose to the patient, Dufault stated that she had retrieved the unusually large quantity of Ativan so that she could prepare an intravenous drip bag and avoid having to return periodically to the Omnidell to obtain the smaller doses prescribed in the physician's orders. The other four instances dated back nearly two months, and Dufault complained that, without forewarning, she could not recall the particulars. She speculated, however, that incomplete documentation by her and an orientee probably explained the discrepancies. The meeting ended on that note.

Brown convened a second meeting two days later. She regarded Dufault's explanation of the discrepancy involving the eighteen milligrams of Ativan as implausible; the patient's intravenous drip had been discontinued several hours before Dufault withdrew the Ativan, and the physician's orders called for the drug to be injected rather than administered by intravenous drip. Dufault stood by her previous account. Brown then presented Dufault with two more alleged inconsistencies in her entries and served her with a termination notice. The stated reason for termination was: "Failure to adhere to the standards of narcotic/controlled substance administration — suspected drug diversion."

Appendix A

Following Dufault's discharge, the MNA filed a grievance on her behalf. The parties eventually submitted two imbricated matters to binding arbitration: (i) whether there was just cause for Dufault's termination and (ii) if not, what consequences should ensue.

The arbitrator conducted an evidentiary hearing. She subsequently issued an opinion concluding that the preponderance of the evidence did not support the claim that Dufault had engaged in drug diversion but, rather, supported her repeated denials of culpability. In the arbitrator's view, Dufault's testimony that the discrepancies were most likely the result of documentation errors was worthy of belief for four reasons: (i) Dufault and other nurses testified credibly that they commonly caught up on their SMS entries during breaks or at the end of their shifts when they could not always remember the exact medications and dosages administered; (ii) Dufault's explanation of the probable cause of the discrepancies had remained consistent throughout the investigation and the grievance process; (iii) Dufault's testimony that ICU nurses occasionally deviated from established documentation protocols had "been more corroborated than rebutted" by the other evidence in the case; and (iv) there was absolutely no proof to substantiate the Hospital's accusation that the discrepancies in the records were attributable to the diversion of drugs.[1] The arbitrator also found that Dufault had received no formal training as a preceptor and that the Hospital had no established policy as

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1. In this vein, the arbitrator noted that Dufault had submitted to three drug tests, each of which had proved negative for the presence of Ativan, morphine, or any other controlled substance.

to which nurse — the preceptor or the orientee — was responsible for documenting the medications administered to patients who were under their joint care.

With specific reference to the Ativan incident, the arbitrator accepted the testimony of two non-party witnesses that it was common practice for ICU nurses to prepare intravenous drip bags well in advance of the time when they would be needed (either for use during their own or succeeding shifts). The arbitrator also credited testimony that although it was not good practice, a nurse might deviate from a doctor's orders and administer medication intravenously rather than by syringe as a time-saving device.

On the basis of these findings, the arbitrator concluded in pertinent part:

> The Hospital failed to carry its burden . . . in this matter. The preponderance of the evidence in the record supports [Dufault's] denial of any culpability with respect to the Hospital's charges of drug diversion. . . . [Dufault] credibly testified as to what she believed were the most likely actions she took (or did not take) with respect to the narcotics she removed from the Omnicell . . . .
>
> In light of the Hospital's failure to submit a preponderance of evidence that contradicts [Dufault's] account. . . the termination . . . is found to be without just cause.

The arbitrator then moved to the remedy question and, taking into account the idiosyncratic facts of the case, ordered the Hospital to reinstate Dufault with back pay and without any loss of seniority.

The Hospital was not pleased. It asked the federal district court to vacate the award on the ground that reinstating Dufault would violate public policy. The MNA cross-filed for confirmation of the award. The district judge referred the case to a magistrate judge, *see* 28 U.S.C. §636(b)(1)(B), who recommended confirmation. On de novo review, *see* Fed. R. Civ. p. 72(b), the district judge adopted the magistrate judge's recommendation and entered judgment for the MNA.[2] This timely appeal ensued.

II. ANALYSIS

Where, as here, the employer and the union have bargained for an arbitrator's construction of a CBA, a court's authority to vacate an arbitral award is closely circumscribed. *Boston Med. Ctr. v. SEIU, Local 285*, 260 F.3d 16, 21 (1st Cir. 2001); *Teamsters Local Union No. 42 v. Supervalu, Inc.*, 212 F.3d 59, 65 (1st Cir. 2000). Thus, a party who challenges an arbitrator's award in the labor-management context must be prepared to undertake a steep uphill climb. Typically, the challenge will fail if the award "draws its essence from the collective bargaining agreement" rather than from the

2. For simplicity's sake, we do not distinguish hereafter between the magistrate judge and the district judge but, rather, take an institutional view and refer to the determinations below as those of the district court. *See e.g., United States v. Maldonado*, 356 F.3d 130, 134 n.1 (1st Cir. 2004).

arbitrator's "own brand of industrial justice." *USW v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). "[A]s long as the arbitrator is even arguably construing or applying the contract," the fact that he or she may have made a mistake — even a serious mistake — will not afford a basis for defenestrating the award. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). That remains true whether the mistake concerns a matter of fact or a matter of law. *Id.*

There are, however, a few exceptions to the general rule that the arbitrator has the last word. *See* 9 U.S.C. § 10(a) (codifying certain exceptions); *Supervalu*, 212 F.3d at 66 (discussing other exceptions). One such exception, which traces its roots to the comthon law doctrine that courts may refuse to enforce illegal contracts, holds that a court may vacate an arbitral award that violates public policy. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). This exception is narrow. The mere fact that "general considerations of supposed public interests" might be offended by an arbitral award is not enough to make the exception available. *Id.* (citation and internal quotation marks omitted). Rather, the award must violate an "explicit . . . well defined and dominant" public policy, as ascertained "by reference to . . . laws and legal precedents." *Id.* (citations and internal quotation marks omitted).

In the context of an arbitration award that reinstates a fired employee, the question is not whether the charged conduct offends public policy or whether some remedy short of unconditional reinstatement (say, a probationary period

or a suspension without pay) might have been preferable. Rather, the sole question is whether the award itself — the order for reinstatement - gives offense. *See E. Assoc'd Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 62-63 (2000). We turn, then, to that question and ask whether the order to reinstate Dufault as an ICU nurse contravenes some explicit, well-defined, and dominant public policy as ascertained by reference to the positive law of Massachusetts (which, of course, includes applicable federal law). *See id.*

This inquiry is not free-form. In determining whether Dufault's reinstatement contravenes Massachusetts's declared public policy, we cannot forget that the parties, through the collective bargaining process, chose arbitration as the preferred means of resolving workplace disputes. Accordingly, we must read the pertinent statutes and regulations "in light of background labor law policy that favors determination of disciplinary questions through arbitration when chosen as a result of labor-management negotiation. *Id.* at 65.

The Hospital relies on federal and state statutes and a state regulatory scheme to undergird its claim that Massachusetts has an explicit, well-defined, and dominant public policy in favor of restricting the distribution of controlled substances. *See generally* 21 U.S.C. § 801-971; Mass. Gen. Laws ch. 94C. It notes that these provisions collectively establish strict controls on the handling of controlled substances and evince a strong concern for preventing the unauthorized distribution of such substances by health-care professionals. Zeroing in on the facts of this case, the Hospital emphasizes that the state's regulations

governing the licensure of nurses set out strict standards of conduct with respect to the administration of controlled substances. *See* 244 Mass. Code Regs. 9.03. Pertinently, those regulations require nurses to (i) comply with the Controlled Substances Act, Mass. Gen. Laws ch. 94C; (ii) maintain the security of controlled substances; (iii) refrain from unlawfully obtaining or possessing controlled substances; (iv) administer drugs only as prescribed; and (v) document the handling, administration, and destruction of controlled substances. 244 Mass. Code Regs. 9.03(6) (a) (8), (35), (37), (38), (39)

Building on this elaborate foundation, the Hospital asserts that Dufault breached the regulations by diverting drugs away from patients, by failing properly to document the dispensation of medications, and by administering Ativan through a medium other than that prescribed in the physician's orders. Consequently, the Hospital says, the arbitrator's award offends public policy because it reinstates a serial regulatory violator to a highly sensitive position.

The principal problem with this line of argument is that it ignores the arbitrator's resolution of disputed issues. With a few limited exceptions not relevant here, an inquiring court is bound by an arbitrator's findings of fact. *See El Dorado Tech. Servs., Inc. v. Union Gen. De Trabaladores*, 961 F.2d 317, 320 (1st Cir. 1992). Once due deference is accorded to the arbitrator's factual findings here, the Hospital's argument withers.

The Hospital suggests that the arbitrator glossed over Dufault's unauthorized diversion of drugs and that even accidental diversion is serious business. After stuffing this

straw man, the Hospital proceeds to shred it, telling us that because Dufault improperly diverted drugs in contravention of the state regulatory scheme, reinstating her to a sensitive position violates public policy. This construct overlooks that the arbitrator, far from glossing over the discrepancies in the Omnicell and SMS records, explicitly found that the Hospital had failed to prove that Dufault diverted any drugs away from patients. Thus, even if the mandated reinstatement of a nurse found to have deliberately diverted drugs might violate an explicit, well-defined, and dominant public policy — and we intimate no view as to whether such a policy has been established — the mandated reinstatement of a nurse who has been exonerated of all charges of intentional drug diversion, such as Dufault, plainly would not. *Cf. Misco*, 484 U.S. at 44 (refusing to vacate a reinstatement order when the employer had failed to prove its allegations of employee misconduct).

The Hospital's attempts to tease a violation of public policy out of Dufault's documentation errors and her use of an unauthorized method of administering Ativan are equally unconvincing. It argues that failure properly to account for controlled substances, even if not deliberate, is nevertheless a grave matter. While we agree with that premise — Dufault's conduct seems to have violated the Massachusetts nursing regulations, *e.g.*, 244 Mass. Code Regs. 9.03(38)-(39) — we do not accept the Hospital's conclusion that this fact somehow undermines the reinstatement order. After all, this appeal tests only whether the reinstatement award, on the facts as found by the arbitrator, contravenes an explicit, well-defined, and dominant public policy. *See E. Assoc'd Coal*, 531 U.S. at 62-63. Once the issue is framed in that manner,

it becomes nose-on-the-face plain that the Hospital has failed to establish any barrier at all to Dufault's reinstatement.

Indeed, the Hospital has not identified a single iteration of positive law that prohibits the reinstatement of a nurse who, without causing injury to patients, made a few documentation errors or deviated slightly from doctors' orders on a single occasion in a long and distinguished career. This failure strongly suggests that the reinstatement order does not violate public policy. *See id.* at 66 (relying heavily on the fact that the reinstatement order did not violate a "specific provision of any law or regulation" in concluding that the order did not run contrary to public policy); *Boston Med. Ctr.*, 260 F.3d at 25 (similar).

To be sure, there is reason to believe that an employer is not invariably required to point to a specific provision of positive law in order to bring a case within the ambit of the public policy exception. *See E. Assoc'd Coal*, 531 U.S. at 63 (dictum). *But cf. id.* at 67-69 (Scalia, J., concurring) (questioning this view). In a prior case in which a reinstatement order did not breach a specific provision of positive law, we required the employer to show that the reinstatement order subsumed employee conduct so egregious that resumed employment would offend some deep-rooted public policy. *See Boston Med. Ctr.*, 260 F.3d at 25. That precedent does not advance the Hospital's cause.

In endeavoring to make the showing that *Boston Medical Center* requires, an employer cannot relitigate the facts as found by the arbitrator. *See Misco*, 484 U.s. at 44-45. In this case, based largely on the testimony of the Hospital's own

witnesses, the arbitrator found that Dufault was a competent, hard-working nurse who had exceeded her employer's standards for many years; that neither Dufault's documentation bevues nor the single instance of her improper administration of Ativan had caused any harm to patients; that her explanation for the discrepancies in the records was credible; and that, in all events, there was no evidence of missing medication, let alone drug diversion. The arbitrator did not find that Dufault posed a risk of harm to patients, that she was incapable of properly documenting the adniinistration of medication, or that she had displayed a pattern of failing to comply with doctors' orders.

We are constrained to credit the various parts of this factual. assessment.[3] *El Dorado Tech.. Servs.*, 961 F.2d at 320. Doing so, we find no principled basis for concluding that Dufault's underlying conduct was such as to render her reinstatement offensive to public policy. *See MidMich. Reg'l Med. Ctr. — Clare v. Prof'l Employees Div. of Local 79, SEIU*, 183 F.3d 497, 504 (6th Cir. 1999) ("Even highly skilled professionals err on occasion, and we think it clear that it cannot violate . . . public policy . . . to contract to retain a nurse. guilty of committing some acts of carelessness.").

In arguing for the opposite result, the Hospital relies on a trio of decisions that vacated reinstatement awards under the public policy exception. *See Russell Mem'l Hosp. Ass'n v. USW*, 720 F. Supp. 583 (E.D. Mich. 1989); *City of Boston*

3. We note, in passing, that this assessment does not seem to be chimerical. During the pendency of this appeal, the Massachusetts Board of Registration in Nursingdismissed the Hospital's complaint against Dufault for insufficient evidence.

v. Boston Police Patrolmen's Ass'n, 824 N.E.2d 855 (Mass. 2005); *Ill. Nurses Ass'n v. Bd. of Trs. of Univ. of Ill.*, 741 N.E.2d 1014 (Ill. 2001). A court must be wary of reliance on precedents which, like these three decisions, involve state policies different than the one at issue. *See Boston Med. Ctr.*, 260 F.3d at 25 n.7 (disregarding the plaintiff's citation of "conclusions of other courts that the public policies of other states forbid the reinstatement of an employee" in factually dissimilar cases). At any rate, the cases cited by the Hospital are readily distinguishable In each of them, the affected employee committed acts far more blameworthy than those that the arbitrator attributed to Dufault. *See Russell Mem'l Hosp.*, 720 F. Supp. at 587 (involving a nurse who was guilty of negligence and insubordination and who had "a propensity for misconduct"); *Boston Police*, 824 N.E.2d at 859 (involving a police officer who had intentionally filed false charges and then committed perjury); *Ill. Nurses*, 741 N.E.2d at 1023-24 (involving an "inattentive . . . [and] . . . below average" nurse who had endangered the lives of two patients, intentionally falsified a patient's chart, and provided negligent care).

A much more instructive case is *Boston Medical Center*, in which an arbitrator ordered the reinstatement of a nurse whose slipshod care had resulted in a patient's death. 260 F.3d at 18- 20. Relying on the nurse's unblemished ten-year work record and the arbitrator's finding that she had not "willfully or callously provided substandard care," we concluded that the reinstatement order did not transgress Massachusetts's public policy. *Id.* at 25. The facts in the instant case are considerably more favorable to the employee than the facts in *Boston Medical Center*; after all, the

arbitrator determined not only that Dufault had achieved an exemplary twenty-five-year nursing career but also that her relatively minor miscues had not threatened the welfare of any patients.

Our refusal to vacate the reinstatement order in *Boston Medical Center* adumbrates the result we must reach here: upholding the district court's confirmation of the arbitrator's reinstatement order. While a single documentation or dispensing error may contravene the state's nursing regulations, not every such error or set of errors necessarily furnishes just cause for termination of a nurse's employment. Context is important. Here, the nature of the errors, the employee's history, the lack of any harm to patients, and the other circumstances as found by the arbitrator persuade us that reinstatement is not an affront to public policy.[4]

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4. At oral argument in this court, the Hospital suggested for the first time that the arbitrator erred in not imposing some lesser penalty once she found discharge unwarranted. This argument was not made in the district court.and is, therefore, not properly before us. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). In all events, the sole question raised by this appeal is whether the reinstatement order offends public policy. That does not encompass the question of whether the imposition of some remedy short of unconditional reinstatement might have been desirable.

Appendix A

III. CONCLUSION

We need go no further. In this matter, the arbitrator supportably found that the Hospital had cashiered Dufault without just cause and ordered her reinstatement. The Hospital's attempt to upset that award is unavailing: although an employer may secure vacation of an arbitrator's reinstatement order in the rare case in which the employer can show that the order itself transgresses an explicit, well-defined, and dominant public policy, the Hospital has wholly failed to bring this case within the isthmian confines of that doctrine.

We understand and appreciate the Hospital's concern with accountability for dangerous drugs. Each case, however, must be judged on its own facts. Here, the arbitrator appears to have weighed that concern in the balance. Given the idiosyncratic facts of the case, we are not at liberty to disturb her decision. What may transpire in different circumstances or if Dufault proves to be a repeat offender is, of course, an open question.

Affirmed

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 9, 2005

CIVIL ACTION NO. 04-30014-MAP

THE MERCY HOSPITAL, INC.,

Plaintiff-Appellant,

v.

MASSACHUSETTS NURSING ASSOCIATION,

Defendant-Appellee.

MEMORANDUM AND ORDER REGARDING REPORT AND RECOMMENDATION AND PLAINTIFF'S MOTION TO STRIKE OBJECTION (Docket Nos. 23 & 26)

March 9, 2005

PONSOR, D.J.

This is an action seeking to vacate an arbitration award in favor of the defendant Massachusetts Nursing Association. On January 13, 2005, Magistrate Judge Kenneth P. Neiman issued his Report and Recommendation, to the effect that the Motion to Confirm the arbitration award submitted by the defendant should be allowed and the Motion to Vacate the award submitted by the plaintiff hospital should be denied. The plaintiff objected to this Report and Recommendation on February 2, 2005 and on February 18, 2005 the defendant filed its motion to strike the objection.

Appendix B

As a preliminary matter, the Motion to Strike (Docket No. 26) is hereby DENIED. The public docket indicates that objections to the Report and Recommendation should be filed by February 2, 2005, and plaintiff complied.

The objection, though filed within the required time period, is substantively deficient. The Magistrate Judge correctly applied the Supreme Court's decision in *Eastern Associated Coal Corp. v. United Mineworkers of Am.*, 531 U.S. 57 (2000) . The reinstatement, given that the arbitrator found the nurses' explanations for mistakes in paperwork entirely credible, violated no "explicit, well-defined and dominant public policy . . . ." *Id.* at 63.

For foregoing reasons, and for the reasons set forth in Magistrate Judge Neiman's detailed memorandum, the Report and Recommendation is hereby adopted upon *de novo* review. The plaintiff's Motion to Vacate the arbitration award (Docket No. 11) is hereby DENIED and the defendant's Motion to Confirm the arbitration award (Docket No. 15) is hereby ALLOWED. The clerk shall enter judgment for the defendant; the case may now be closed.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 13, 2005

Civil Action No. 04-30014-MAP

THE MERCY HOSPITAL, INC.,

Plaintiff-Appellant,

v.

MASSACHUSETTS NURSING ASSOCIATION,

Defendant-Appellee.

REPORT AND RECOMMENDATION WITH REGARD TO PLAINTIFF'S MOTION TO VACATE AND DEFENDANT'S MOTION TO CONFIRM ARBITRATION AWARD (DOCUMENT NOS. 11 AND 16)

JANUARY 13, 2005

NEIMAN, U.S.M.J.

In this action, Mercy Hospital, Inc. ("Plaintiff") seeks to vacate an arbitration award to the Massachusetts Nursing Association ("Defendant"). The award ordered Plaintiff to reinstate Nancy Dufault, a member of Defendant's union, after her discharge as an intensive care nurse on August 29, 2002. Plaintiff's motion to vacate the arbitration award, together with Defendant's cross motion to confirm, have been referred to this court for a report and recommendation. *See* 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below,

the court will recommend that Plaintiff's motion to vacate be denied and Defendant's motion to confirm be allowed.

I. BACKGROUND

As the parties are well aware, the court must rely on the facts as the arbitrator found them. *See El Dorado Technical Servs., Inc. v. Union General de Trabajadores de Puerto Rico*, 961 F.2d 317, 320 (1st Cir. 1992). Here, Dufault was hired by Plaintiff in 1977. At the time of her termination, some twenty-five years later, she was working the "night shift" (7 p.m. to 7 a.m.) in the intensive care unit ("ICU"). Dufault cared for seriously ill and dying patients, all of whom received various pain and anxiety-reducing drugs such as Ativan, Lorezapam and morphine. Her duties involved the administration of these medications as well as overseeing patient care by new nurses. The final performance evaluation given to Dufault prior to her termination stated that she had met the overall standards expected by Plaintiff and that she had exceeded the expected standards in documentation. She was also cited as being a very strong, expert ICU nurse.

In the fall of 2001, a medicine-tracking device called an "Omnicell" was introduced to the ICU. Omnicell is an ATM-like machine that records which nurses remove medicine from it, the patients for whom the medicine is destined, and the name and quantity of the medicines removed. The nurses obtain medication by entering their codes into Omnicell, receiving the medication through Omnicell, and then administering the medicine and recording its administration in a separate, computerized system called "MAR" or "SMS". Along with the other ICU nurses, Dufault was given a brief

Omnicell training and then used the device alongside pre-existing forms.

The first discrepancy in Dufault's documentation was discovered in June of 2002 by Cindy Gallant, a nursing supervisor. Gallant noticed that there was a difference between the amount of Ativan that had been withdrawn from Omnicell and what had been administered to patients. After confronting Dufault about the discrepancy, Gallant found her explanation acceptable and let the incident pass without further comment.

In July, however, Gallant again noticed discrepancies in Dufault's paperwork and, after reviewing the records, placed Dufault on administrative leave effective August 21, 2002. Dufault was again told that there had been a discrepancy found between what she had removed from Omnicell and what she had charted as being administered to patients.

Thereafter, the Director of Medical and Surgical Nursing, Mary Brown, set up a meeting with Dufault for August 27, 2002. Dufault was presented with Omnicell readouts (which she had never seen before) and SMS readouts (which she had completed) and was asked to explain the discrepancies. Dufault offered some reasons and speculation but was uncertain as to exactly what had happened in every incident given that the documents referred to patients as far back as two months prior to the meeting.

Following the meeting, Director Brown met with Beverly Ventura, Plaintiff's Vice President. The two suspected that Dufault was diverting drugs and scheduled another meeting

with her for August 29, 2002. Following that meeting, Dufault was given a final paycheck and a notice stating that her employment was being terminated for "[f]ailure to adhere to the standards of narcotic/controlled substance administration — suspected drug diversion."

Although Plaintiff never requested that Dufault take a drug test, she took three on her own. Two of the tests were within the first two weeks following her termination; both were negative for the presence of drugs. Then, in March of 2003, Dufault took a hair follicle drug test, which can detect the presence of drugs within the last six months, and again the results were negative.

Meanwhile, arbitration hearings took place in February, June and July of 2003. Two issues faced the arbitrator: (1) whether Dufault's termination was for just cause under the applicable collective bargaining agreement; and (2) if not, what the remedy should be. After due consideration, the arbitrator issued an award ordering Default's reinstatement on December 22, 2003.

The arbitrator found that a preponderance of the evidence supported Dufault's denial of any culpability with respect to the drug diversion charge. Furthermore, the arbitrator believed Dufault was denied due process when not given prior access to all the documents used in the termination meetings. Nonetheless, the arbitrator found, Default gave credible explanations for the paperwork discrepancies. In essence, the arbitrator believed that Dufault had made mistakes in the paperwork, or had taken short-cuts, or helped out other nurses, thereby occasionally deviating from procedures (as

did many of the other nurses). In the end, the arbitrator determined that Dufault's termination lacked just cause and directed Plaintiff to reinstate her, with back pay and interest and without loss of seniority, and to pay the costs of arbitration.

Plaintiff filed this action to vacate the arbitration award on January 23, 2004, pursuant to 9 U.S.C. § 10 and 29 U.S.C. § 301. In due course, the parties filed the instant cross motions and the court heard oral argument.

II. STANDARD OF REVIEW

The standard for a court's review of an arbitration award in a collective bargaining case such as this is well settled and quite circumscribed. "Because the parties to a collective bargaining agreement 'have bargained for the arbitrator's construction of the agreement,' the arbitrator's interpretation is entitled to great deference by the courts." *Boston Med. Ctr. v. SEIU*, Local 285, 260 F.3d 16, 21 (1st Cir. 2001) ("*BMC*") (quoting *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000)). Thus, an arbitrator's interpretation of the agreement is rarely set aside, and even a finding that the interpretation is erroneous is not enough to overturn the award. *See id.* at 21.

Of course, as Plaintiff notes, a court may vacate an award if it violates public policy, but only in cases "where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and. . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *United*

Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987). When, as here, reinstatement is at issue, the question before the court turns not on whether the employee's conduct violated a public policy, but whether the reinstatement order itself does. *See BMC*, 260 F.3d at 23 (citing *Eastern*, 531 U.S. at 62-63).. The public policy cannot be assumed or implied. Rather, the question is whether the arbitrator's reinstatement order "run[s] contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?" *Eastern*, 531 U.S. at 63 (citing *Misco*, 484 U.S. at 43).

III. DISCUSSION

Plaintiff asserts that the arbitrator's reinstatement order here was contrary to public policy. In particular, Plaintiff contends that the documentation errors which led to Dufault's termination are all specifically prohibited by regulations, namely, those pertaining to standards of narcotic and controlled substance administration. *See* 244 C.M.R. § 9.03(35), (38) and (39) (2004).[1] Because the use of

1. In pertinent part, section 9.03 provides as follows:

(35) Security of Controlled Substances. A nurse licensed by the Board and engaged in the practice of nursing shall maintain the security of controlled substances that are under his or her responsibility and control.

. . . .

(38) Administration of Drugs. A nurse licensed by the Board shall not administer any prescription drug or non-prescription drug

(Cont'd)

controlled substances is highly regulated by both state and federal law, Plaintiff continues, the arbitrator, in effect, prohibited the hospital from disciplining a nurse who violated these rules.

Although Dufault's actions may have, in fact, violated certain regulations, the court finds no compelling argument that the *reinstatement order* itself violated any public policy clearly articulated in a law or regulation. In the court's estimation, therefore, Plaintiff's argument is misplaced for at least three reasons.

First, the Supreme Court's *Eastern* decision is instructive. There, a truck driver was fired after twice testing positive for marijuana. The arbitrator determined there was no "just cause" for the termination and ordered reinstatement. As is true here, the employer sought to vacate the arbitrator's decision on public policy grounds. However, because no law mandated the discharge of an employee who tested positive for drug use, the Court found that the order to reinstate the employee did not violate public policy. Although "reasonable people [could] differ as to whether reinstatement or discharge [was] appropriate," the Court explained, "both employer and

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(Cont'd)
to any person in the course of nursing practice except as directed by an authorized prescriber.

. . . .

(39) Documentation of Controlled Substances. A nurse licensed by the Board shall document the handling, admission, and destruction of controlled substances in accordance with all federal and state laws and regulations and in a manner consistent with accepted standards of nursing practice.

union have agreed to entrust this remedial decision to an arbitrator." *Id.*, 531 U.S. at 67.

Plaintiff attempts to distinguish *Eastern*. In at least one way, however, the facts here are actually less favorable to the employer than those in *Eastern*; although Plaintiff had accused Default of drug diversion, it never proved that Dufault had been using drugs. Nonetheless, Plaintiff argues that, unlike the employer in *Eastern*, the hospital has independent responsibilities regarding the medications in question. In the court's view, however, this is a distinction without a difference. Plaintiff neglects to mention that, unlike the truck driver in *Eastern*, Dufault was found by the arbitrator only to have committed documentation errors. Moreover, there was no proof that any medication in fact was missing. At bottom, here as in *Eastern*, "[t]he parties bargained for arbitration to settle disputes" and should therefore be bound by the arbitrator's determination. *Id.*, at 39. *See also W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 765 (1983) ("Regardless of our view might be of the correctness of [the arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation. A federal court cannot second-guess it.").

Second, the First Circuit's *BMC* decision also supports the arbitrator's actions here. In *BMC*, a nurse was discharged after engaging in serious substandard practices that led to the death of a baby. The arbitrator, however, reversed the discharge, opting instead for a nine-month unpaid suspension in light of the nurse's ten-year record of unblemished employment. Denying the hospital's motion to vacate the award, the court found that, while Massachusetts has an

obvious concern for patient safety and competent nursing care, ther was no public policy expressly prohibiting the nurse's reinstatement. That result appears mandated here as well.

Third, the court is not persuaded by any of the decisions cited by Plaintiff which, ostensibly, vacated arbitration awards on public policy grounds. Two of the decisions have been abrogated by the Supreme Court, *see Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841 (1st Cir. 1997), *abrogated by Eastern*, 531 U.S. at 61; *United States Postal Service v. Am. Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984), *abrogated by Misco*, 484 U.S. at 35, and a third, *Illinois Nurses Ass'n v. Bd. of Trustees of the Univ. of Ill.*, 741 N.E.2d 1014 (Ill. App. Ct. 2001), is distinguishable. In *Illinois Nurses*, the court held that an arbitrator's award reinstating a nurse violated a state statute favoring safe nursing care. In contrast to the case at hand, the Illinois statute explicitly provided that that state has a "public interest" favoring safe nursing. *See id.*, 741 N.E.2d at 1014 (citing Illinois Nursing Act of 1987 (225 ILCS 65/1 *et seq.* (West 1992)).[2] It is that kind of positive law (not present here) which *Eastern* requires.

2. In pertinent part, the Illinois statute provided as follows: "The practice of professional and practical nursing in the State of Illinois is hereby declared to affect the public health, safety, and welfare and to be subject to regulation and control the public interest. It is further declared to be a matter of public interest and concern that the practice of nursing, as defined in this Act, merit and receive the confidence of the public and that only qualified persons be authorized to so practice in the State of Illinois." 225 ILCS 65/2 (West 1992).

Finally, the court finds misguided Plaintiff's reliance on *Russell Mem'l Hosp. Ass'n v. United Steelworkers of Am.*, 720 F. Supp. 583 (E.D. Mich. 1989). As Plaintiff notes, the court in *Russell* determined that Michigan has a public policy in favor of providing safe and competent nursing care and, accordingly, vacated the reinstatement of a nurse who had been discharged for negligently administering medication. In so finding, however, the *Russell* court relied on the rationale in two cases that the First Circuit has explicitly declined to follow, namely, *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665 (11th Cir. 1988), and *Iowa Elec. Light & Power Co. v. Local Union 204 Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987). *See BMC*, 260 F.3d at 25 n.7. As has the First Circuit, this court believes that both *Delta* and *Iowa* - and, hence, *Russell* — provide unpersuasive indicators as to whether the reinstatement of a Massachusetts nurse violates Massachusetts' public policy. In other words, the court has little choice but to recommend rejection of Plaintiffs public policy argument.[3]

Before concluding, the court has two additional comments. First, given its recommendation, the court finds it unnecessary to address Defendant's alternative contention, i.e., that, assuming *arguendo* that the reinstatement order violated Massachusetts' public policy, the termination itself violated Dufault's due process rights. Second, the court has not addressed a separate request raised for the first time in Defendant's brief, namely, "that the Court award costs,

3. The court does not suggest that Plaintiff is without a remedy concerning Defendant's discipline since, it appears, that the state board responsible for licensing nurses can independently address the issue.

attorneys['] fees, and such other and further relief as justice may require." (Document No. 15 at 9.) Plaintiff has not had the opportunity to respond to this latter request. Should this report and recommendation be adopted, however, Defendant, perhaps, should be given the opportunity to pursue that request.

IV. CONCLUSION

For the reasons stated, the court recommends that Plaintiff's motion to vacate the arbitration award be DENIED and that Defendant's cross-motion to confirm the award be ALLOWED.[4]

DATED: January 13, 2005

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
U.S. Magistrate Judge

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4. The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection with the Clerk of this Court **within ten (10) days** of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Secretary of Health & Human Seivices*, 848 F.2d 271, 275 (1st Cir. 1988); *United States v. Valencia-*

(Cont'd)

Appendix C

(Cont'd)
Copete, 792 F.2d 4, 6 (1st Cv. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir. 1980). *See also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

APPENDIX D — OPINION AND AWARD OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 22, 2003

In the Matter Of The Arbitration Between:

MASSACHUSETTS NURSES ASSOCIATION,

and

THE MERCY HOSPITAL, INC.,

Re: AAA Case No. 11 300 02745 02
Before: Arbitrator S.R. Butler, Ph.D., J.D.
Date of Award: December 22, 2003

OPINION AND AWARD

Duly appointed by the American Arbitration Association pursuant to the above-listed Parties' January 1, 2001 Collective Bargaining Agreement, the Undersigned held hearings in Springfield, Massachusetts on February 21, June 10, 11, 12, and July 2, 2003. Witnesses at the hearing were sworn. A written transcript was produced covering the last four (4) of the five (5) days of hearing. Both Parties submitted post-hearing briefs. The record was declared closed on December 1, 2003, with the Opinion and Award due on or before January 5, 2004.

Appendix D

APPEARANCES

For the MNA: Mark A. Hickernell, Esq. McDonald & Associates

For the Hospital: Maurice M. Cahillane, Esq. Egan, Flanagan and Cohen, P.C.

APPEARANCES

For the MNA:
Stephen Mikelis, MNA Chairperson
Andrea Fox, MNA Associate Director
Patricia Jacque, RN
Beverly Thomas, RN
Nancy Dufault, RN, Grievant

For the Hospital:
Robert Lewandowki, Director of Pharmacy
Beverly A Ventura, V.P. Patient Care Services
Jean M. D'Espinosa, Nurse Manager, ICU
Kathy Hutchins, Clinical Nurse Specialist
Mary Brown, RN, Director Medical Surgical Nursing
Robert J. Kasper, MD, Interim V.P. Medical Affairs
Patricia Duclos-Miller, Director of Quality Improvement

Appendix D

STIPULATED ISSUES

Was the termination of the Grievant for just cause? If not, what should be the remedy?

THE AGREEMENT

The Parties' January 1, 2001 — December 31, 2003 Collective Bargaining Agreement provides in pertinent part (Jt. Ex. 1)

Article XIV

14.01 Management Rights

> The Association recognizes that the Hospital has the obligation of serving the public with the highest quality efficient and economical medical care and in meeting medical emergencies . . . The Association further recognizes the right of the Hospital to. . . discipline or discharge employees for just cause. . .

THE FACTS

This case involves the August 29, 2002 discharge of Nancy Dufault, a Registered Nurse, for "failure to adhere to the standards of narcotic/controlled substance administration — suspected drug diversion," specifically, failure to administer certain drugs that doctors had ordered for five (5) different patients under her care. The Grievant had been employed by Mercy Hospital in Springfield, Massachusetts

("the Hospital") since 1977. At the time of her termination, she had been working as a nurse in the Hospital's Intensive Care Unit (ICU) on the night shift (7 p.m. to 7 a.m.) caring for patients many of whom were critically ill and/or in the last stages of dying — all involving the administration of various pain/anxiety-reducing drugs such as Ativan, Lorezapam, and morphine.

It is undisputed that the Grievant was required, amongst her other duties, to act as a preceptor of other nurses new to the ICU, and that in this role she was to oversee the patient care given by the new nurse ("the orientee"). It is also undisputed that the Grievant was given no formal training in "precepting" *per se* and that the Hospital had no written guidelines or policies as to who is responsible for the documenting of medications given by a preceptor and/or an orientee. It appears that the Grievant, an older, experienced RN, may have been viewed as somewhat intimidating by some of the younger nurses at the Hospital, but she was commended for her work as a preceptor in 1995. (MNA Ex. 2) The Grievant's last performance evaluation prior to her termination showed that she had, overall "[met] the standards" expected by the Hospital and that she had "exceed[ed] standards" in documenting, amongst other duties. In sum, the evaluation stated (MNA Ex. 3):

> Nancy is a very strong expert critical care nurse. She cares very solidly for her patients and their dignity. Nancy usually works CCU sick and helps her colleagues as a resource on nights. Most recently she has rotated to the ICU when needed which has been very helpful. She picks up a lot of

> extra time which also displays her concern for the unit. Nancy keeps her skills very sharp, always aware of the latest and greatest new thing. She does follow through to assure all her patients' needs are met. She excels at attendance and punctuality — again always picks up extra time.

It is further undisputed that, during the fall of 2001, the Hospital introduced a new machine to the ICU, the Omnicell — an ATM-like machine that keeps track of the nurse removing medications from it, the patient for whom the medications are being removed, and the name and quantity of medications removed. The Grievant and others were given brief, introductory training on how to operate the Omnicell itself, but there were no changes made in the various documenting forms Used by the Hospital for some time, i.e. forms such as the "Medication Administration Record" ("SMS" or "MAR"), filled out by nurses at the computer in the nurses' station, and/or the "Flow Sheet" (a four-sided document filled out by hand in small spaces indicating the patient's blood pressure, temperature, heart rate, vent data, lab data, nursing care and treatments, pulses, medication intake, urine, etc. output, lines, physical assessment data, and nurses notes. (Jt. Ex. 4)

In June of 2002, Cindy Gallant, a nursing supervisor, brought to the attention of Jean D'Espinosa, another nursing supervisor, something that appeared to be a discrepancy between what the records showed the Grievant had withdrawn from the Omnicell and what had been administered It was Ms. D'Espinosa's testimony that she questioned the Grievant about what seemed like a large

amount of Ativan having been withdrawn, but she thought the Grievant's explanation was reasonable, and she let it pass. Specifically, she attested (Tr. I, p. 22):

> Q. Now, did anything else come of this incident?
> A. No.
> Q. And why didn't you do anything else?
> A. I felt really comfortable with her answer. She had been a nurse a very long time in the ICU. There was no reason to believe anything else.

In late July of 2002, however, Ms. Gallant again brought up the matter of apparent disparities involving the Grievant's withdrawals from the Omnicell. This time D'Espinosa directed Gallant to review the medical records of the relevant patients, and she obtained pharmacy records for Gallant's review. At the end of August, Gallant presented the results of her review to D'Espinosa. D'Espinosa concluded that the Grievant had failed to chart some of the medications she had withdrawn, and she took the matter up with Director of Medical/Surgical Nursing, Mary Brown.

On or about August 21, 2002, Brown directed that the Grievant be put on administrative leave immediately, pending a further investigation by Kathy Hutchins. When the Grievant called D'Espinosa to ask why she was being put on administrative leave, she was told that there had been a discrepancy found between what she had removed from the Omnicell and what the SMS showed she had administered and that she would be called in for a meeting hopefully by the end of the week. The Grievant testified that she then "tried to think of Omnicell things that I had taken out that I might

not have signed out in the SMS system that would warrant such an action by the hospital." (Tr. II, p. 69) All she could think of was one instance where she had removed "multiple vials of Ativan." (Id., p. 70)

On Monday, August 26, 2002, Director Brown called the Grievant and set up a meeting with her for 10 a.m. the following morning, August 27, 2002. According to the Grievant, Brown told her that "this was my chance to dispute the discrepancy, or give my explanation of the transgressions that they had found between the Omnicell and my SMS documentation." (Id.) The meeting the next morning was attended by the Grievant, a MNA representative, Mona Karkut, D'Espinosa, and Brown. Brown presented the Grievant with Omnicell readouts (documents the Grievant had never seen before) and SMS readouts (documents filled out by the Grievant that she had seen before). According to the Grievant, the meeting lasted between 30 and 40 minutes.

> A. [Brown] would present — show me the Omnicell, show me the SMS, and then expect me to recollect what had transpired on this [day] or caused me [to make] this discrepancy...
>
> Q. And were you able, on the 27th, to recall the specific instances that were presented to you?
>
> A. I tried to give responses to what could have happened, or what could have caused this discrepancy on them. But not knowing who the patients were, or even being able to associate, even if they gave me a name, what the patient was — I

mean, most of the events were two months prior. (Tr. II, pp. 72-73)

The Grievant further attested that she was shown no other documents besides the Omnicell and SMS readouts and that, when she asked what the flow sheets or her nurse's notes said, D'Espinosa said that, "'If it's not charted, it's not documented,' that 'The nurse's notes is not a legal part of the chart"' (T.II, p. 75) The Grievant offered her best recollections and speculations as to what she might have done in the various cases where the records seemed to show discrepancies. The meeting ended inconclusively.

It was Mary Brown's testimony that she then met with the Hospital's Vice President, Beverly Ventura, told her about the Grievant's responses at the meeting and "at that point, we were very suspicious that we had some type of drug diversion going on." (T I, p. 126) Brown attested that she and Ventura agreed on two solutions: either the Grievant would be allowed to take leave pending completion of the Substance Abuse Rehabilitation Program (SARP) or "if we could not resolve the discrepancies at the second meeting that was scheduled for the 29th, that we would have no option but to terminate Nancy, based on suspected drug diversion, and report her." (T I, p. 127)

On August 29, 2002, a second meeting was held with the Grievant. In attendance were the Grievant, a MNA representative, Dave Powers, D'Espinosa, and Brown. Brown informed the Grievant that one of her explanations had essentially been disproved because records showed that the i.v. drip she had claimed to have bolused had in fact been

discontinued on that patient some time earlier. Brown also brought up two new discrepancies. The Grievant again asked if her nurse's notes explained why she had taken out a certain amount of morphine for one patient, and was told that they did not. The meeting ended with the Grievant being offered an opportunity to meet with Brown privately. Then she was presented with a termination notice and a final paycheck. The effective date of discharge was the same day: August 29, 2002. The reason for termination given on the termination notice was (Jt. Ex. 2):

> Failure to adhere to the standards of narcotic/ controlled substance administration — suspected drug diversion.

It is undisputed that the Hospital did not ask the Grievant to take a drug test before terminating her. It is further undisputed that the Grievant had herself tested twice at her own expense for substance abuse, including Ativan, Ativan-like substances, and morphine, within a week of her termination, and both tests were negative. The MNA states that a hair follicle test which can determine whether the subject has taken any drugs in the prior six months was done in March of 2003, and that it, too, was negative.

THE POSITIONS OF THE PARTIES

The Hospital: It is the position of the Hospital that there was just cause for the Grievant's termination. Briefly summarized, the arguments put forward by the Hospital are the following:

Appendix D

First, while there is no dispute that the Hospital bears the burden of proof in a discharge case such as this, arbitrators do not agree as to what evidentiary standard applies: preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. The Hospital maintains that the proper standard here is the preponderance of the evidence. This is so, the Hospital argues, because (Hosp. Brief, p. 8)

> A hospital is not in the same position as other employers with respect to the subject employee use and/or possession of drugs and/or controlled substances. Unlike other employers, a hospital is actually involved in the dispensing and administration of these substances. . . . In a hospital, unlike other places of employment, employees have access to controlled substances, and the hospital has a special duty to monitor their use. . . Therefore, the hospital must be permitted a high standard for employee behavior in the handling of controlled substances and not be burdened by a higher than usual burden of proof in matters related to the dispensing of controlled substances.

Second, it is the Hospital's contention that the evidence it presented combined with the Grievant's inability to explain what happened to the missing drugs amply demonstrates that there was just cause to terminate her employment. "Investigation of the medical records demonstrated that the grievant had a pattern of practice which could only be explained by some form of diversion on her part."

(Ibid., p. 9) Even though she was accompanied by a Union Representative at the time she was confronted with the charges against her, the Grievant never suggested that she might be able to explain if she were provided with certain records. In fact, the Grievant never was able to explain the discrepancies between the drugs she removed from the Ornnicell and the drugs she showed as administered — even at the arbitration hearing after she had had considerable time to examine all the relevant records. It is irrelevant that the Grievant passed a drug test after her termination. It matters not what happened to the missing medications. The Hospital is only responsible to see that all drugs are properly administered to its patients. Where the Grievant was unable to account for all the drugs she wIthdrew, her termination was fully justified.

The MNA: It is the position of the MNA that the Grievant's discharge was without just cause. The MNA contends as follows:

First, the grievance is sustainable on due process grounds alone. Where, as here, the employer failed to give the employee a fair chance to be heard, or where, as here, the employer failed to conduct an adequate investigation before imposing discipline, arbitrators have overturned the discipline on due process grounds alone. (Citations omitted) In this case, "the termination of Nancy Dufault shocks the conscience" because, despite the fact that she had been employed at the Hospital since 1977 and was well known for her competence and devotion, the Hospital neither gave her a fair opportunity to respond to the charges against her, nor did it conduct an adequate investigation, including a drug

test and interviews with relevant witnesses, nor did it consider progressive discipline before terminating her. "The most basic due process considerations should have compelled the Hospital to provide Dufault with the full patient records, including nurse's notes, for each of the alleged discrepancies between medications withdrawn from the Omnicell, and medications administered. Because it did not do this the discharge is without just cause." (MNA Brief, pp. 15-16)

Second, the grievance must be sustained because the evidence shows that the Grievant never diverted the drugs she was accused of diverting. In its termination notice, the Hospital effectively admitted that it had only reason to "suspect" that the Grievant might have diverted the seemingly missing medications. Nor did the Hospital present any persuasive *evidence* of drug diversion many months later at the arbitration hearing. Suspicion is not grounds enough. "It is appalling that the Hospital would have ruined the career and good name of an excellent nurse like Dufault when it knew that it had not *proven* any serious charge against her." (Ibid., p. 22, emphasis added)

Third, even if all of the charges against the Grievant are somehow found to be valid, tennination was inappropriate. "Termination is an inappropriate punishment for the first offense of a reliable, long-term employee." (Id., p. 32) In this instance, the Grievant's nearly thirty (30) years of service should be viewed as a mitigating factor. At a minimum, the Grievant's termination should be reduced to a more appropriate penalty.

Appendix D

In sum, for all of the aforestated reasons, the MNA asks that the grievance be sustained. As remedy it asks that the Grievant be reinstated without loss of seniority or other benefits, that she be made whole for lost earnings, including interest at the statutory rate of 12% and that she be made whole for the other costs, including private attorneys and stenographers incurred by the Grievant as a result of the Hospital's actions. Finally the MNA asks that the Arbitrator retain jurisdiction over any disputes arising from the implementation of the remedy awarded.

OPINION

It is undisputed that, to prevail in this matter, the Hospital must prove, at least by a preponderance of the evidence, that the Grievant committed the acts that formed the basis of her termination, namely that she knowingly engaged in drug diversion. This the Hospital did not do. The Hospital's evidence consisted of little more than insistence that *only* drug diversion could explain the discrepancies involving the five (5) patients it had identified as apparently not receiving all of the medications taken out of the Omnicell for them. It is simply not the case that this is the only explanation possible. On the contrary, the Grievant never deviated from her first (and most plausible) explanation, namely that, in all likelihood most of the discrepancies could be accounted for as simple inaccuracies or omissions when she was filling out the SMS/MAR on the computer at the nurse's station at the end of her long (12 hour) night shift. The fact that the Grievant was never able to recollect with any exactitude what she did with x amount of Ativan for y patient on z day in no way reduces her credibility. It is common knowledge that

the more routine a given task is, the more quickly it is forgotten. The Grievant was an experienced nurse caring for a number of patients who were on various pain-alleviating drugs, and she was administering varying small amounts (1-2 mg) of these drugs, some on an as-needed basis, some on a continuous iv. drip, some by injection — all as a *very routine* part of her normal duties as an ICU nurse.

It is undisputed that the Hospital never gave the Grievant copies of the relevant documents until months after her termination on August 29, 2002 just as the arbitration hearing in this matter was commencing in February of 2003. When the Hospital confronted the Grievant on August 27 and 29, 2002 and expected her to remember accurately (without the assistance of her own notes[1] and without time to pore over the records) what she had done weeks, months, earlier, the Hospital was expecting too much. The Arbitrator finds that, when the Hospital refused to give the Grievant copies of (or, at the very least, access to) her own nurse's notes, flow sheets and copies of the Omnicell and SMS readouts it said showed discrepancies, the Hospital committed a serious procedural error that severely prejudiced the Grievant's ability to defend herself. To put it more succinctly, the

1. Even accepting the Hospital's position that it was not proper to record medication administration in the nurses' notes section of the flow sheet (as opposed to the SMS/MAR), the point here is that it would have helped the Grievant remember what she did with respect to any given patient had she been allowed to read the nurses' notes regarding that patient. Again, refusing to provide her with copies of those notes even after she asked what they said, was a serious violation of the Grievant's rights to due process, including her right to a fair investigation, before she was terminated.

Hospital denied the Grievant her rights of due process. As stated above, it was unreasonable to expect the Grievant to be able to remember accurately what she did with respect to five (5) patients a few days earlier — never mind several months earlier.[2] And it was doubly unreasonable and unfair for the Hospital to use the Grievant's good faith efforts to "think out loud" about what she "might" have done, about what she "probably" did, about what her orientee "should" have done, about what she "would" have done under similar circumstances, and so forth as if it were sworn testimony after being given time and opportunity to review all the relevant records. It was not. The Grievant was simply speculating. That she was unwise in speculating out loud while under such pressure is self-evident. However, it was something the Hospital itself encouraged her to do by not allowing her to see her notes, and by leading her to believe that she was being accused only of poor documentation or questionable. nursing practices, not a serious, reportable offense involving diversion of narcotics.[3]

The MNA is correct; the discharge in this case is without just cause on procedural grounds alone. However, as stated earlier, it is also without just cause on the merits because the Hospital failed to carry its burden of proof by a preponderance of the evidence. On the contrary, the preponderance of the

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2. The investigation went back to early May of 2002.

3. It is undisputed that the Grievant was not informed of the drug diversion charge until she was handed the termination notice and a final paycheck at the end of the meeting held on August 29, 2002, the day termination took effect.

evidence supports the position of the MNA. After finally being given the time and opportunity to study all the relevant documentation with care and reflection, the Grievant testified credibly and plausibly as to what probably[4] happened to the narcotic medications that she took out of the Omnicell for the five (5) patients in question.

For the following reasons, the Arbitrator finds the Grievant's testimony credible: First, the Grievant's demeanor and conduct from the beginning was consistent with someone who has been falsely accused, but who is genuinely uncertain as to what exactly she did or did not do over a period of time when she was working long (12 hour) night shifts in a busy ICU, on at least one occasion simultaneously orienting a new RN while on all occasions caring for a number of critically ill and dying patients — and, often only at the end of the shift, catching up with paperwork, i.e. documenting medications administered in at least two different records, the computerized SMS/MAR and the handwritten Flow Sheet/Nurses Notes.

Second, Hospital Counsel subjected the Grievant to thorough cross-examination. The Grievant did not deviate. On the contrary, she continued to speculate, even acknowledging that she *might* have given one patient an extra milligram of Ativan after the physician had reduced the

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4. The Grievant's testimony at arbitration took place more than a year after the alleged incidents of drug diversion. She could not reasonably be expected by that time to do more than explain what "probably" happened. Her testimony made sense, however, and was generally corroboiated by two RN's who were her co-workers in the ICU.

medication ordered. This is the testimony of a conscientious nurse who cares about her patients and wants to alleviate their pain, not the testimony of a nurse who diverted pain medication away from patients.

Third, notwithstanding their own credibility as managers, none of the Grievant's accusers had any basis other than the apparent discrepancies in the records for believing that the Grievant was engaged in drug diversion. None had seen or heard her behave in any way that indicated she was using or diverting drugs. Nor had the two fellow RN's, Pat Jacque and Beverly Thomas, who testified on behalf of the Grievant. On the contrary, all agreed that the Grievant was an exceptionally competent, hardworking, ICU nurse.

Fourth, two of the Orievant's co-workers, Jacque and Thomas, corroborated the Grievant's testimony as to routine practices on the ICU floor. Ms. Jacque testified that she had worked with the Grievant in the ICU for eighteen (18) years, regarded her as an exceptionally competent nurse, and that, until the Grievant was terminated, mixing of "courtesy bags" for the next shift was routine. Specifically, she attested (Tr. 2, p. 19):

> Prior to Nancy being terminated, because it's such a busy place, there's so much going on, if a patient was on any type of medication drip, whether it be a vasoactive medication, or like a morphine drip, or a sedative, just out of common courtesy, we would mix up another bag for the oncoming shift if we knew that that could run out fairly shortly. Even maybe a few hours ahead. . . . And we would

> tell the nurse. We'd say, "I've got a bag of this mixed up. I have a bag of that mixed up." And everybody did it.
>
> Once Nancy was terminated, nobody does it. Because if I took something out of the Omnicell, and put it on a bedside table, but I wasn't there on the next shift to hang it, I couldn't sign it off in the computer system. But the oncoming nurse would. And there would be a discrepancy there. There would be a discrepancy of, I was the one who signed it out in the Omnicell, but I wasn't the one who hung it.
>
> Now, because of Nancy being terminated, there is no common courtesy any more. We just tell — there's a common courtesy, as far as I will say to someone, "There's 5 cc's left in your Ativan drip or. . . You need to go mix that up right away," instead of having it there for them.

Fifth, there is no independent evidence whatsoever that the Grievant herself was using controlled substances. On the contrary, the Grievant had herself tested shortly after her termination, and it is undisputed that the tests showed no drug use.

Sixth, the Grievant's testimony at arbitration was more corroborated than rebutted. The Grievant went through the records of each of the five (5) patients and offered step-by-step, specific explanations for what she believes probably happened to the "missing" medications in each instance.

Appendix D

There is no evidence, or contention, that any of the five (5) patients suffered negative consequences as a result of the alleged drug diversion. There is no evidence that what the Grievant said probably happened could not possibly have happened. The first witness called by the Hospital on rebuttal, Dr. Robert Kasper, stated that, although he knew he could check the computórized or printed-out SMS/MAR if he wanted to see how much medication a given patient had received, he "would many times [just] talk with the nurse." (T IV, p. 20) This corroborates the Grievant's testimony that physicians and nurses all understand that some time can go by before the nurse who administered x amount of medication to y patient finds the time and opportunity to record that fact on z document (be it the flow sheet, nurses' notes, or the SMS/MAR) — and that physicians and nurses converse with each other during the course of their shifts in order to stay current with patient treatment, putting off the paper documentation tasks until later. This also corroborates the Grievant's testimony that she may have mis-stated the time(s) and/or amount(s) of dosages when she did her paperwork at the end of her shift; if she was operating mostly from memory by that time it would be surprising if she *could* remember *exactly* what she did when over the course of a 12 hour shift.

The second witness called on rebuttal, Patricia Duclos-Miller testified that it was not "proper" for nurses to record the administration of controlled substances in nurses' notes, and it was not "proper" to take out additional medications ahead of time or to use a discontinued i.v. drip where the physician's order was for an i.v. push, and that extra narcotics (i.e. those not administered) should be wasted in the presence of (and co[illegible]-signed by) another RN. This testimony, while

credible, is non-dispositive. It in no way disproves the Grievant's testimony that she (and other RN's) occasionally deviated from proper procedures by using short-cuts or by helping each other out during breaks, and so forth.

Finally, the Hospital recalled Ms. Hutchins on rebuttal. Hutchins testified to the mechanics of i.v. drips (bags) vs. i.v. pushes (thumb-driven syringes). She stated that it would be improper practice for a nurse to administer a medication by drip if the physician had ordered a push. However, she also testified that the push required the nurse to stand at the patient's side with her thumb on the syringe for perhaps as long as three (3) minutes. She explained as follows (T IV, p. 51):

> Different medications have to be given at different speeds. Ativan, according to our policy, is given 2 milligrams over one minute. So, in this scenario, if you're going to give 6 milligrams, if you're allowed to give 2 milligrams over one minute, you would have to give the 6 milligrams over a three minute period of time. So the nurse would look at her watch second hand and give a little at a time, over a three-minute period. When she was done, she would disconnect. She would have another syringe of normal saline because there's still medication left in this little adaptor piece, and you have to make sure the patient receives the whole thing. Plus you always want to make sure you clean out that little piece so the clot . . . doesn't form in the catheter. So when you jut flush it. And Mercy Hospital has the policy that we flush it with

> 2 cc's of normal saline. So then after you gave your Ativan, you would also give this. And you would give this fairly slowly, too, because you have to remember you still have some medication in there. Then you would disconnect, and you would be done.

As to what the Grievant said she did in this instance (using a discontinued i.v. drip that was still in the room with the patient instead of an i.v. push), Ms. Hutchins acknowledged that this was possible to do, although certain steps had to be taken — it just was not regarded as "a good practice" — partly because the Grievant would have had to remain in the room during the 22 seconds it would take the machine before it changed to the "keep open" rate of 5 cc's per hour in order for her to turn off the machine. (Id., p. 60) Although she disagreed with the methods the Grievant said she used in administering an additional 18 mg. of Ativan that she had removed from the Omnicell, Hutchins did not testify that it was impossible or medically lethal to do what the Grievant thought she did. In sum, as with the testimony of the two other rebuttal witnesses, Hutchins' testimony operates more to support the Grievant's account (that she and other busy nurses sometimes take technically improper short-cuts) more than it operates to rebut it.

Summary:

The Hospital failed to carry its burden of proof in this matter. The preponderance of the evidence in the record supports the Grievant's denial of any culpability with respect to the Hospital's charges of drug diversion. The Grievant

was denied due process when she was not provided with all relevant records, including her own notes, until the arbitration hearing in this matter commenced approximately six (6) months after her termination and over nine (9) months after the period of time under investigation. In spite of being unable to examine all relevant records and in spite of the passage of time, the Grievant credibly testified as to what she believed were the most likely actions she took (or did not take) with respect to the narcotics she removed from the Omnicell and was accused of diverting. In light of the Hospital's failure to submit a preponderance of evidence that contradicts the Grievant's account, much less any evidence whatsoever that the Grievant was using controlled substances herself, the termination of the Grievant is found to be without just cause.

Appendix D

AWARD

The termination of the Grievant, Nancy Dufault, was not for just cause.

The grievance is sustained.

As remedy, the Hospital is directed to reinstate the Grievant immediately to her former position without loss of seniority or other benefits and to make her whole by paying her the difference between what she would have received had she not been terminated, including overtime, and what she actually earned from the date of her termination to the date of her reinstatement pursuant to this Award, plus interest at 12%. The request for reimbursement of the costs attendant to the Grievant's obtaining the services of private attorneys and stenographers is denied.

The Arbitrator retains jurisdiction with respect to any disputes involving the implementation of the remedy for a period of six (6) months from the date of this Award.

S. R. Butler, Ph.D., J.D.
Arbitrator

Boston, MA
Dated: December 22, 2003

(3)

No. 05-1080

Supreme Court, U.S.
FILED
MAR 27 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE MERCY HOSPITAL, INC.,

Petitioner,

v.

MASSACHUSETTS NURSES ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether an order confirming an arbitration award is proper, where the arbitrator found that the hospital failed to prove its charges against a registered nurse, and required a hospital to reinstate and make whole the registered nurse whose explanation for mistakes in paperwork were found to be "entirely credible" and whose mistakes did not result in harm to any patient.

Whether repeated appeals of a labor arbitration award so offend the public policy in favor of final and binding arbitration that sanctions are appropriate.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Massachusetts Nurses Association, is a Massachusetts non-profit corporation with no parent corporation and no stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
MISSTATEMENTS OF FACT IN THE PETITIONER'S BRIEF	3
REASONS FOR DENYING THE PETITION	8
I. The Lower Court Decisions Do Not Meet The Standard For Review By This Court	9
II. The Lower Courts Applied The Correct Standard And Reached The Correct Result	11
III. This Appeal Frustrates The Established Public Policy In Favor Of Final And Binding Arbitration	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

B.L. Harbert International, LLC v. Hercules Steel Co., ___ F.3d ___ (2006), 2006 U.S. App. LEXIS 5035 (February 28, 2006) (11th Cir. No. 05-11153) 15, 16

Boston Medical Center v. Service Employees Int'l Union Local 285, 260 F.3d 16 (1st Cir. 2001) 12, 14

City of Boston v. Boston Police Patrolmen's Association, 443 Mass. 813 (2005) 13

Dorado Beach Hotel Corp. v. Union de Trabajadores de la Industria Gastronomica, Local 610, 959 F.2d 2 (1st Cir. 1992) 15

Eastern Associated Coal Corp. v. United Mine Workers of Amer., 531 U.S. 57 (2000) 11, 12, 14, 15

El Dorado Technical Services, Inc. v. Union General de Trabajadores de Puerto Rico, 961 F.2d 317 (1st Cir. 1992) 15

Mercy Hospital, Inc. v. Massachusetts Nurses Association, 429 F.3d 338 (1st Cir. 2005) (Pet. App. A.) 8, 10, 13

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 15

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 15

STATUTES AND RULES

9 U.S.C. §10 et seq 15

29 U.S.C. §301 et seq 1, 9, 15

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 10 9

Supreme Court Rule 15(2) 3

Supreme Court Rule 42 17

STATEMENT OF THE CASE

This is an appeal from an order confirming an arbitration award under 29 U.S.C. §301. The underlying arbitration award was issued December 22, 2003. A complaint to vacate the arbitration award was filed in the District Court on January 23, 2004, and answered on February 2, 2004. The case was referred to the Magistrate Judge on March 15, 2004. The parties filed cross motions to vacate and to confirm the arbitration award. Following oral argument on the motions, the Magistrate Judge issued a Report and Recommendation on January 13, 2005 recommending confirmation of the arbitration award. The plaintiff/petitioner filed objections to the Magistrate Judge's Report and Recommendation on February 18, 2005. On March 9, 2005, the District Court adopted the Magistrate Judge's Report and Recommendation, and entered judgment for the defendant/respondent. The plaintiff/petitioner filed a Notice of Appeal on April 5, 2005. Following oral argument, the First Circuit Court of Appeals issued an opinion on November 21, 2005 affirming the decision of the District Court.

STATEMENT OF FACTS

The petitioner, Mercy Hospital ("Hospital"), and the respondent, Massachusetts Nurses Association ("MNA"), are parties to a collective bargaining agreement. The Hospital operates an acute care hospital in Springfield, Massachusetts, and MNA is the collective bargaining representative of a bargaining unit of registered nurses at the Hospital. The instant matter was processed through the grievance and arbitration provisions of the parties' contract, culminating in a multi-day arbitration hearing.

As the District Court recognized, "the court must rely on the facts as the arbitrator found them." Pet. App. C. p. 21a. The arbitrator found as follows: The grievant, Nancy Dufault, was an exceptionally competent, hardworking, ICU nurse. She had been employed by the Hospital since 1977. On August 29, 2002, she was discharged by the Hospital for "failure to adhere to the standards of narcotic/controlled substance administration – suspected drug diversion." The grievant's most recent evaluation found that, overall, she met the standards expected by the Hospital, and that she had exceeded the Hospital's standards in a number of areas, including documenting. The grievant denied having diverted drugs or intentionally failing to meet accepted standards for administration of controlled substances.

At hearing, the grievant's testimony was credible. Her testimony was also more corroborated than rebutted. One of the grievant's actions alleged by the Hospital to violate nursing practice was in fact common on the ICU, at least prior to the grievant's termination. There was no independent evidence whatsoever that the grievant herself was at any time under the influence of controlled substances. There was likewise no evidence, or contention, that any patients suffered any negative consequences as a result of the grievant's actions.

The collective bargaining agreement between the parties permits discipline or discharge of non-probationary employees only for just cause. The arbitrator found that the discharge was without just cause on due process grounds alone. The arbitrator also found that the discharge was "without just cause on the merits because the Hospital failed to carry its burden of proof by a preponderance of the evidence." "The preponderance of the evidence

in the record supports the Grievant's denial of any culpability with respect to the Hospital's charges of drug diversion." As a remedy, the arbitrator ordered that Ms. Dufault be immediately reinstated, and be made whole for losses incurred due to the Hospital's improper termination.

MISSTATEMENTS OF FACT IN THE PETITIONER'S BRIEF

Pursuant to Rule 15(2), MNA here lists factual errors in the Hospital's brief.

1. The Hospital states at Pet. p. 3 fn. 1 that "it is both undisputed and implicit in the findings that the discrepancies at issue in the removal of drugs involved the removal of more drugs than had been prescribed by the physician." *See also* Pet. p. 5. The *alleged* discrepancies involved the removal of more drugs than had been prescribed by the physician. The grievant was able to resolve the discrepancies at hearing to the arbitrator's satisfaction.

2. The Hospital states at Pet. p. 4 that "[w]ith no explanation from Ms. Dufault, the hospital terminated her employment . . . " The arbitrator did not find that there was "no explanation from Ms. Dufault."

3. The Hospital states at Pet. p. 5 that "as a basis" for her decision, "the arbitrator cited the grievant's own inaccuracies and omissions in 'keeping proper records with respect to controlled substances.'" The arbitrator cites more than one basis for her decision, including "procedural grounds alone." Pet.

App. D. p. 46a. Nowhere on the cited pages does the arbitrator "cite[] the grievant's own inaccuracies and omissions in 'keeping proper records with respect to controlled substances.'" as a ground for her decision. Pet. App. D. pp. 44a-45a. MNA does not believe that the Arbitrator cites this as a basis for her determination that the firing was without just cause anywhere.

4. The Hospital states at Pet. p. 5 that "[t]he inaccuracies and omissions were, of course, one of the transgressions that the grievant was accused of." This is a *post hoc* effort to expand the reasons for which the grievant was terminated. The Arbitrator characterized the grounds for termination as "failure to administer certain drugs that doctors had ordered for five (5) different patients under her care." Pet. App. D. p. 34a. She also characterized the "basis of [the grievant's] termination" as "that she knowingly engaged in drug diversion." Pet. App. D. p. 44a. Even if the Hospital legitimately believes it presented other reasons for the grievant's termination at hearing, the arbitrator found that this was the reason.

5. The Hospital states that the arbitrator "excused the whole notion of proper documentation as required by the law as too much to expect." Pet. p. 5. Nowhere does the arbitrator do this. Rather, the arbitrator found that the grievant's testimony on this point was corroborated by other evidence that, in a busy intensive care unit, documentation sometimes took second place to patient care, and that errors could result. Pet. App. D. p. 50a.

6. The Hospital states that the arbitrator "mocked the concept of compliance with proper practice." Pet. p. 6. This is a serious mischaracterization of the arbitrator's opinion. In context, the arbitrator's statement was no more than an evidentiary evaluation supporting her ultimate conclusion that, contrary to the Hospital's initial allegation, the grievant had not stolen the medications in question. Left unsaid, but well known to all concerned, is the just cause principle of equal treatment – an employer cannot single out just one employee for discipline where every employee does the same thing. Nowhere does the arbitrator "mock" related regulatory standards; rather, she finds that the general practice in the grievant's unit deviated to an extent from such standards, and that in such a context, no just cause existed to terminate the grievant for her practice, particularly where the actual allegation against the grievant was that she "knowingly engaged in drug diversion." Pet. App. D. pp. 48a-52a.

7. The Hospital states that the "arbitrator decided that the failure to follow doctor's orders and the improper method of administration didn't matter as long as it was 'possible' and 'not lethal.'" Pet. p. 7. As above, the Hospital continues to construe the Arbitrator's statement that "what the Grievant thought she did" was not "impossible or medically lethal" as if that were the standard of practice to which the grievant was being held. Again, in context, the arbitrator's statement was no more than an evidentiary evaluation supporting her ultimate

conclusion that the grievant had not stolen any medications. Pet. App. D. pp. 49a-52a.

8. The Hospital states that the arbitrator found that the grievant "used a 'drip' discontinued by the physician to deliver a controlled substance to a patient, i.e., in the opposite of the manner prescribed by the physician" and that this was not "good practice." Pet. p. 11 and 11 n.2. The arbitrator does not make this finding, but recites testimony to this effect from a Hospital witness. Pet. App. D. p. 52a. Even conceding that this was not optimal practice, the Hospital is well aware that delivery of a medication by the "wrong route" is not typically a disciplinary matter.

9. The Hospital states that the arbitrator found that the grievant "misstated the time and amount of dosages of controlled substances she administered." Pet. p. 11. Rather, the arbitrator found that the testimony of other witnesses as to practice at the Hospital corroborated the grievant's testimony that "she may have [unintentionally] mis-stated the time(s) and/or amount(s) of dosages when she did her paperwork at the end of her shift; if she was operating mostly from memory by that time it would be surprising if she *could* remember *exactly* what she did when over the course of a 12 hour shift." Pet. App. D. p. 50a.

10. The Hospital states that the arbitrator found that the grievant "failed, completely on some occasions, to record her administration of controlled substances in the medical record (SMS/MAR) where it was to be properly